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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1968

No. 1168

FRANK A. LOMBARDY, et al.,

Appellants,

vs.

PETER KIEWIT SONS' CO., a corporation, and PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,

Appellees.

APPELLANTS' REPLY BRIEF TO MOTION TO DISMISS OF APPELLEE PEOPLE OF THE STATE OF CALIFORNIA

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INTRODUCTION

The State's utter failure to direct any argument whatever to the importance and

substantiality of the federal question presented is an eloquent concession of the severity of the problem presented to the court, and its nationwide impact. Appellants cannot overemphasize the arguments they made at pp. 8-10 of the Jurisdictional Statement. These arguments stand unchallenged.

This is a nationwide as well as a federal problem brought before the Court. Admitted damage and injury is being wreaked on the Homeowners, while the State courts have refused to adjudicate the violation of Federal Constitutional rights, on the supposed authority of a state statute.

Accordingly, Appellants submit that the State's motion should be denied [1] and probable jurisdiction noted.

1/ Insofar as the State's motion is based on an asserted tardiness of docketing, Appellants invite the Court's attention to pp. 6-8, of Appellants' Reply Brief to Motion to Dismiss or Affirm of Appellee Peter Kiewit Sons' Co.

THE STATE'S ARGUMENTS CONCEDE THE PRINCIPAL CONSTITUTIONAL CONTENTION OF HOMEOWNERS

There is no dispute here whether a nuisance can be so noxious as to amount to a constitutional "taking". There is likewise no dispute that public transportation facilities can thus work a taking-by-nuisance of adjoining land. The State concedes these things, and only argues that there is no liability for interferences with adjoining property resulting " ... from normal operations of a railroad or a public highway." (State's Brief, p. 7.) 2/

But even that argument of the State is deficient. The law dealing with taking-by-nuisance caused by 19th Century railroad technology seems hardly capable of delineating the legal impact of 20th Century urban freeway technology whose Fifth Amendment ramifications have never been reviewed by this Court. Even in their heyday railroads did not criss-cross inhabited portions of cities every few miles (as they do in the Los Angeles basin). 3/

2/ Please note that the State's assertion that the Homeowners did not plead damage special to themselves is factually incorrect. See Record herein, Clerk's Transcript, p. 93, lines 29-32.

3/ Los Angeles freeways are being built so as to form a grid with freeways only 2-3 miles apart.

Even on a heavily-used railroad mainline, trains never ran incessantly, continuously, day and night, as does traffic on urban freeways. The issue before the Court can be rationally resolved only by a factual inquiry into the extent and severity of the nuisance constituting the "taking". Yet Homeowners were not permitted their day in court on the merits.

Moreover, the State's argument begs the questions it necessarily raises:

(1) What are "normal operations" of an urban freeway?

(2) Who is to say what these "normal operations" are? Can a defendant merely assert that operations are "normal" and thereby foreclose the courts from factual inquiry as to the supposed "normalcy"?

(3) What are the factual standards by which "normalcy" is to be judged?

These questions cannot be answered without any inquiry into the facts, on the merits.

The State ignores the procedural posture of this case: This is an appeal from a dismissal based on the sustaining of a demurrer. The Homeowners were never permitted to offer any evidence; nor was evidence offered by any

other party. 4/ Upon what basis, then, can the State assert to this Court that the highway construction and operations in Santa Fe Springs are "normal"? There is simply nothing in the record upon which one can decide if the operations as to the homeowners were "normal". Compare United States v. Certain Properties, etc. (1966, W.D. Mich.) 252 F. Supp. 319, where the trial court in the exercise of commendable judicial fairness and pragmatism held that the inquiry as to whether a highway-generated nuisance amounted to a "taking" could not be decided on the pleadings, nor on affidavits, but had to be determined as a question of fact on the merits.

The long and the short of the matter is that on the supposed basis of this Court's comments on liability for "normal" operations of 19th Century railroad technology, 5/ the State

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4/ Please bear in mind that in California the pleading of evidentiary facts is not permitted. Green v. Palmer (1860) 15 Cal. 412, 414; Chadbourn et al., "California Pleading", §866, pp. 811-12 (1961). Thus, Homeowners were deprived of any opportunity to even state in evidentiary detail the nature of the "taking" complained of.

5/ And, of course, it must be emphasized that those comments of the Court were based on hard evidence developed in a jury trial. See Richard v. Washington Terminal Co. (1914) 233 U.S. 546, 548.

wants to foreclose any factual inquiry into the impact on the environment of 20th Century urban freeways.

The State's argument lacks merit. The most recent governmental studies indicate that because of its "round-the-clock, continuous" nature, noise from urban freeways is more disturbing even than aircraft noise. See Noise Sound Without Value, Committee on Environmental Quality of the Federal Council for Science and Technology, Sept. 1968, p. 16. The noise level to which dwellings within 100 feet of a freeway are continuously exposed, is as high or higher than the maximum permissible level of noise for places of employment under the U. S. Department of Labor Safety and Health Standards. 6/

Whether governmental interference with land amounts to a "taking" often depends on the intensity of the interference. This principle is well settled by decisions of this Court.

(1) In Peabody v. United States (1913) 231 U.S. 530, 540, the Court held that very rare firings of naval guns

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6/ See Cohen, "Location-Design and Control of Transportation Noise", Jour. of Urban Planning and Development Division, Proceedings of the American Soc. of Civil Engineers, Dec. 1967, p. 67, fig. 3. And compare Federal Register, Vol. 33, No. 184, p. 14259.

near the affected land did not constitute a "taking".

(2) In Portsmouth Harbor etc. Co. v. United States (1919) 250 U.S. 1, 2, involving the same land and the same guns, the Court held that a slight increase in the firing frequency did not raise the interference to the level of a "taking".

(3) But, in Portsmouth Harbor etc. Co. v. United States (1922) 260 U.S. 327, again involving the same land and the same guns, the Court held that allegations of new and additional naval gunnery activity gave rise to a right to trial on the merits, which could not be denied upon a demurrer. In the words of Mr. Justice Holmes: "The present case was decided upon demurrer. The question, therefore, is not what inferences should be drawn from the facts that may be proved, but whether the allegations, if proved, would require or at least warrant, a different finding from those previously reached." 260 U.S. at 328-29. (Emphasis added).

It is, therefore, submitted that Appellants have been deprived of an opportunity to try on the merits the very constitutional issue now conceded by the State to be present: is the interference with and damage to the Appellants' homes by the construction and operation of an

adjacent freeway sufficiently intense (or "abnormal") to give rise to a "taking"?

It seems plain that any State statute capable of thus denying one's right to a day in court to test the merits, is palpably unconstitutional.

THE STATE'S ARGUMENTS MISCONCEIVE THE NATURE OF THE "ADEQUATE NON-FEDERAL BASIS" DOCTRINE. THIS DOCTRINE MAY NOT BE USED TO COMPEL THE U. S. SUPREME COURT TO ACCEPT A STATE COURT REVIEW OF A PLEADING

In making its "adequate non-federal basis" argument, the State utterly disregards the settled principle that under this doctrine, state court decisions rendered on the pleadings may not be used to blind the U. S. Supreme Court to the presence of federal issues in the pleadings.

This Court has held that where - as in the case at bench - a case reaches the Court on pleadings seeking the vindication of an appellant's federal rights, the interpretation thereof by state courts " . . . cannot . . . ." be accepted by this Court. Brown v. Western Ry. Co. (1949) 338 U.S. 294, 296. The State is precluded from setting up pleading rules as a means of foreclosing constitutional review by the U. S. Supreme Court. Rogers v. Alabama

(1904) 192 U.S. 226; First Nat. Bank v. Anderson (1926) 269 U.S. 295, 346; American Ry. Express Co. v. Levee (1923) 263 U.S. 19, 21; Davis v. Wechsler (1923) 263 U.S. 22, 24; Covington & Lexington Turnpike Co. v. Sandford (1896) 164 U.S. 578, 595-96.

Moreover, it should be noted that the State's arguments are also wrong, because the California Court of Appeal did not even purport to decide this case on any threshhold "state" issue (see Jurisd. Statement, p. A-6). Rather, the court below expressly acknowledged the presence of a federal constitutional issue before it (Jurisd. Statement, p. A-2), and pitched its decision on the proposition that regardless of merits Appellants cannot state a constitutionally-based cause of action 7/ because a state statute 8/ sweepingly provides that "[n]othing" done under the authority of a state statute can be a constitutionally compensable nuisance (see Jurisd. Statement, p. A-6). It is that

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7/ It must also be emphasized that the California Court of Appeal itself characterized the pleading rule it invoked against the Homeowners, as "arbitrary" (see Jurisd. Statement, p. A-2, fn. 1). It does not appear open to argument that arbitrariness is an exceedingly poor basis on which to limit constitutional rights.

8/ Referring to Calif. Civil Code §3482. See Jurisd. Statement, pp. 3-4.

holding which gives rise to unconstitutionality of Calif. Civil Code §3482, because the import of that holding is that the California legislature can foreclose judicial vindication of conceded federal constitutional rights by simply passing a statute.

> "Just compensation is provided for by the Constitution, and the right to it cannot be taken away by statute." Seaboard Air Line R. Co. v. United States (1923) 261 U.S. 299, 304.

In short, there is no "adequate" state principle capable of foreclosing an inquiry into the merits of a complaint which alleges an interference with a plaintiff's federal constitutional rights. To assert the existence of such a principle is to declare the United States Constitution operative only at the pleasure of state legislatures.

CONCLUSION

Fairly read, the State's brief concedes that the case at bench gives rise to substantial federal issues.

> "The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action' - when they are born, whether they proliferate, and when they die."
> United States v. Dickinson (1947) 331 U.S. 745, 748-49.

Appellants respectfully urge the Court that probable jurisdiction be noted.

Respectfully submitted,

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